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No. 93-76

In The

Supreme Court of the United States

October Term, 1993

GEORGE CHERREY, *et al.*,

Petitioners,

v.

GERALD DIAZ, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY TO BRIEFS IN OPPOSITION

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REPLY TO BRIEFS IN OPPOSITION

Pursuant to U.S. Sup. Ct. Rule 15, 28 U.S.C. (1993), Petitioners George and Kathleen Cherrey ("the Cherreys") hereby submit their reply to the briefs in opposition filed in this matter by Respondents Alleck Resnick, Resnick, Sopher & Perlow, P.A. and Bay State Title Company ("Resnick Respondents") and Respondent Baltimore Savings & Loan Association, F.A. ("BS&L").

I. REPLY TO BRIEF IN OPPOSITION OF THE RESNICK RESPONDENTS

The Resnick Respondents commence their arguments with the following:

> Supreme Court Rule 10.1 provides, in pertinent part, as follows:
>
> > A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor.
>
> Sup. Ct. R. 10.1. The Court should deny the Cherreys' Petition because there are no "special and important reasons" to review this case.

Resnick Respondents' Brief at 3.

However, the above is a quotation out of context. Immediately after the material quoted above, Rule 10.1 proceeds with the following:

> The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter. . . .
>
> * * *
>
> (c) When a . . . United States court of appeals . . . has decided a federal question in a way that conflicts with the applicable decisions of this Court.

The Petition tendered by Petitioners herein is predicated on both of these special and important reasons. As noted in the Petition at 5 and 6, the court below explicitly acknowledged that there was a conflict among the Circuits. And, finally, as this Court has recently ruled, to eliminate a conflict among the Circuits regarding the limitation period for a federal statute, is alone sufficiently important to warrant *certiorari*. *Lampf, Pleva, Lipkind, Prupis and Petrigrow v. Gilbertson*, ___ U.S. ___, 115 L.Ed.2d 321, 330 (1991). Accordingly, Respondents' argument is frivolous.

At pages 4 and 5 of their brief, the Resnick Respondents raise issues that were neither presented to, nor passed upon by, the Fourth Circuit in the decision below. Respondents allege:

> [T]he Cherreys sued Resnick, RS&P and Bay State based on vague and conclusory allegations that they were somehow involved in a scheme to defraud. The RICO aspect of the claim arises merely out of the Cherreys' alleged, subsequent discovery of two other couples who claim to have been defrauded in a similar fashion.

Resnick Respondents' Brief at 4.

They also allege that the dismissal of the RICO claim is supported on a number of different "independent" grounds; most particularly, that citation to the other victims is insufficient to allege a "pattern of racketeering activity." *Id.*

However, these arguments ignore the law and misrepresent the facts. As noted above, these arguments were never presented to, nor passed upon by, the Fourth

Circuit below and, accordingly, are improperly advanced by the Respondents. *Lytle v. Household Manufacturing*, 494 U.S. 545, 551 n.3 (1990); *Youakim v. Miller*, 425 U.S. 231, 234, (1976); *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957).

More significantly, the Respondents' allegations totally misrepresent the facts. Appendix A attached hereto contains relevant pages of the Cherreys' complaint filed below. As shown therein, the complaint named as other victims in the pattern of racketeering activities, brothers Anthony and Michael Munafo, Paul and Ronald Maas and Paul Maas' wife Donna Maas, and Patsy and Daniel Hoag. As a result, four separate complaints were filed involving essentially the same fraudulent scheme and pattern of racketeering activities: *Cherrey, et al. v. Diaz, et al.*, No. R91-1361; *Munafo, et al. v. Diaz, et al.*, No. R91-1359; *Maas, et al. v. Diaz, et al.*, No. 91-1360; and *Hoag, et al. v. Diaz, et al.*, No. R91-2642.

The Respondents filed motions to dismiss below, alleging statute of limitations violations in all but the *Hoag* proceeding. Moreover, the motions to dismiss contained all the other "independent" grounds, including the allegation that the complaints were "vague and conclusory," as Respondents alleged above, and similarly, that the complaints did not sufficiently allege a "pattern of racketeering activity." The district court granted the motions to dismiss on statute of limitation grounds in the Cherrey and Maas complaints, which were later appealed to the Fourth Circuit in that court's proceeding below. However, the district court denied the motions to dismiss the Munafo and Hoag complaints, specifically rejecting, *inter alia*, the Respondents/Defendants' allegations that

the complaints were too vague and conclusory[1] and did not sufficiently allege a pattern of racketeering activities. *See* relevant pages of the district court decisions contained in Appendix B attached hereto.

Accordingly, not only do the Respondents' allegations ignore the decisions of this Court, they misrepresent the facts as well.

II. REPLY TO BRIEF IN OPPOSITION OF RESPONDENT BS&L

Respondent BS&L tenders two reasons for denying the writ. One is essentially the same as the latter reason of the Resnick Respondents addressed above: that dismissal is supported by independent grounds other than limitations, including that the RICO "pattern" was not sufficiently alleged. However, as noted above, these independent grounds were rejected by the district court. Accordingly, this position too both ignores the decisions of this Court and misrepresents the facts below.

BS&L's other argument is its allegation that there is no conflict among the Circuits; and

> [N]o amount of sophistry can convert [the Petition] into one warranting review on certiorari. The decision of the court of appeals in the case at bar is in accord with all other decisions by a

---

[1] The Cherrey complaint was 46 pages long and contained 185 paragraphs, and the Respondents characterizing it as "vague and conclusory" is ludicrous on its face.

> court of appeals in which a similar factual issue has been presented.

BS&L's Brief at 2.

The Respondent does not cite what portion of the Petition is "sophistry." The bulk of the reasons for granting the writ tendered by the Petitioners was simply a quotation of the Fourth Circuit decision below wherein the Fourth Circuit acknowledged that there exists a conflict among the Circuits. Indeed, even the district court, in granting the motion to dismiss, stated: "The circuits are currently split over the proper method of determining when a RICO claim accrues." *See* Petition, Appendix B, at 11A. If, as the Respondent appears to be arguing, it is "sophistry" to conclude that there is a conflict among the Circuits on this issue, then Petitioners proudly stand with our fellow sophists, the honorable judges of the district and circuit courts below.

Neither the district court nor the Fourth Circuit below rejected the Petitioners' allegation that they did not discover (and reasonably could not have discovered) that they were victims of a RICO "pattern" of racketeering activities until they became aware in January of 1991 that the Respondents had similarly defrauded the seven other victims cited above. The courts simply ignored the pattern element, based on their view that the only relevant issue was the discoverability of the injuries. Nonetheless, the decision below makes its clear that the decisions of the Third, Eighth, Tenth and Eleventh Circuits, would not have time-barred the Petitioners' complaint.

Respondent BS&L, however, challenges the decision below and alleges that there is no conflict among the circuits; and, at pages 3-7, attempts to show, by citing portions out of context of the decisions of those other circuits, that there is no conflict. To fully show that these citations are indeed out of context would take more than the ten pages here permitted. Instead, Petitioners will merely restate the ultimate findings of those decisions, which the Fourth Circuit acknowledged were in conflict with its rulings below: pursuant to the decisions of the Third, Eighth, Tenth and Eleventh Circuits, the limitation period for RICO causes of action does not begin to accrue until the plaintiff has (or should have) discovered *both* the injury and the pattern; and, in this case, that accrual would have commenced in January 1991.

However, there is one example of Respondent's case arguments which Petitioners can address within the page restrictions, and which also provides a good overview. At 3-4, Respondent suggests that the *Granite Falls* decision was not in conflict with the decision below:

> In *Granite Falls, supra,* the court of appeals adopted the standard of accrual announced in *Bivens, supra.* The *Granite Falls* court reversed and remanded a case dismissed as time-barred, stating, "the question remains open on remand, after evidentiary development, whether under [the *Bivens* rule] the Bank's RICO claims are time barred because the Bank either did discover, or reasonably should have discovered, these claims more than four years prior to the commencement of this action," 924 F.2d at 155.

However, compare this with the argument Respondent/Appellees advanced regarding the *Granite Falls* decision in their brief to the Fourth Circuit below:

> 2. *The Granite Falls Decision.*
>
> The United States Court of Appeals for the Eighth Circuit adopted an accrual rule which is joined only by the United States Courts of Appeals for the Third, Tenth, and Eleventh Circuits. These courts resolved the accrual issue by applying a discovery rule to the pattern element, as well as to the injury requirement of a civil RICO cause of action. The rationale that the Eighth Circuit adopted is:
>
> > With respect to each independent injury to the plaintiff, a civil RICO cause of action begins to accrue as soon as the plaintiff discovers, or reasonably should have discovered, both the existence and source of his injury and that the injury is part of a pattern.
>
> *Granite Falls v. Henrikson*, 924 F.2d 150, 153-54 (8th Cir. 1991).
>
> Despite the contentions of the Maas' and the Cherreys to the contrary, the accrual rule in this Circuit is, in fact, different. . . .

Brief of Appellees at 10-11, *Cherrey, et al. v. Diaz, et al.*, No. 92-1524, *et al.* (4th Cir. 1992).

Whether or not the Respondent's arguments should be characterized as "sophistry," there is no question as to their inconsistency.

III. CONCLUSION

As presented in the Petition herein, and as further addressed in this reply, the most important and principal reasons for the exercise of this Court's *certiorari* jurisdiction are existent in this proceeding. There is a clear conflict among the Circuits, and the Circuits are so evenly split, as to create the clear danger of the forum shopping which was condemned in this Court's decision in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 154 (1987).

Moreover, the position of the Fourth Circuit below, as well as the First, Second and Seventh Circuits, are clearly in conflict with both the intent of Congress and this Court's decision in *Malley-Duff* above: "The heart of any RICO complaint is the allegation of a *pattern* of racketeering," 483 U.S. at 154 (emphasis in original). Allowing the limitations periods to accrue when only injury is known, and not the pattern of racketeering, means that Petitioners and others similarly situated could be time-barred before they were aware that they could commence an action. This, obviously, "would thwart the legislative purpose of creating an effective remedy." *Malley-Duff*, 483 U.S. at 154.

Respectfully submitted,

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APPENDIX A

Relevant Pages Of The Complaint Below

* * *

[p. 21] Balt. S&L previously set out were done in furtherance of the conspiracy.

85. The conspiracy to defraud the Cherreys caused damage to the Cherreys.

OTHER VICTIMS

86. On or about April 4, 1988, brothers Anthony and Michael Munafo ("the Munafos") saw an advertisement in *The Baltimore Sun* for buying rental properties. The advertisement said the properties were in excellent condition.

87. Michael Munafo called the telephone number in the advertisement. In a series of approximately three telephone calls between on or about April 5, and April 19, 1988:

A) Michael Munafo explained that he had never owned any real property and did not have a car and therefore was interested only in property that was easy to manage;

B) Diaz said he and Shannon Turner ("Turner") had three rental properties for sale in downtown Baltimore, 203 S. Woodyear Street, 216 S. Bruce Street and 324 S. Bruce Street;

C) Diaz said the properties were easy to manage;

D) Diaz said he and Turner had owned the properties for years and were selling now because the tax depreciation benefits had ended and they were liquidating a partnership;

E) Diaz said the properties were easily rented;

F) Diaz said the properties were in good condition;

* * *

114. On or about April 6, 1986 brothers Paul and Ronald Maas saw an advertisement in *The Baltimore Sun* that advertised investment rental properties for sale. On or about April 6 Paul Maas called the telephone number in the advertisement and Diaz said he was liquidating a partnership and had properties for sale.

115. On or about April 7 or 8, 1986, Everson made a telephone call to the Paul Maas residence and spoke to his wife, Donna Maas. Everson said he wanted to set up an appointment to inspect the properties.

116. On or about April 8, 1986, Paul Maas returned the telephone call and spoke to Diaz on the telephone. Diaz and Paul Maas then arranged a meeting to view the properties.

117. At the meeting, which occurred in Everson's red Cadillac, Diaz and Everson told the Maases:

A) They were selling because they had exhausted the tax depreciation from the properties and were liquidating a partnership because they were getting out of the rental property business;

B) They had owned the properties for years;

C) The properties had always been easily rented and they never had any problems renting the properties;

D) The tenants were long-term, stable tenants and they only had one eviction in the years they had owned the properties;

E) Their rental history was so good they would guarantee the first month's rent to the Maases;

F) All the properties met all housing codes;

* * *

and Donna Maas at 12 Ayr Court in Baltimore County, in return for which Diaz and Everson agreed to release their second mortgages on the properties in the first package.

150. On or about November 13, 1990, the Maases sold 2658 Frederick Avenue to Spence for $10,000 and sold 308 South Norris to Spence for $6800. The Maases paid this $16,800, plus approximately $7500 additional to Spence, in return for which Spence released his first mortgage on 210 and 308 South Norris Street, 2658 Frederick Avenue and 6409 Eastbourne Avenue.

151. The results of these deals, which were forced on the Maases because of the excessive purchase prices for the properties induced and caused by the frauds, was large financial losses for the Maases. In each of the years from 1986 to 1991 the Maases paid substantial amounts of money and expended substantial amounts of time to repair and renovate the properties, just to place them in the condition represented by Diaz and Everson.

152. Counsel for Diaz mailed a letter dated April 5, 1991 to the Maases. The letter stated that the Masses owed Diaz over $38,000 for two mortgages on the properties and stated that foreclosure proceedings would be instituted if the amounts were not paid in full by the due dates of the five year balloon, i.e., May 16, 1991 and May 27, 1991.

153. Resnick, on behalf of Balt. S&L, mailed a letter dated May 1, 1991 to the Maases, stating that the Maases were late making their April mortgage payment to Balt. S&L and that he would begin a foreclosure action on May 15, 1991 if the delinquency was not cured.

154. On or about February, 1989, Patsy Hoag read an advertisement in either *The Baltimore Sun* or the *Enterprise* advertising rental properties for sale as investments. [p. 38] She spoke to Diaz who told her:

A) He had a rental property for sale;

B) He was selling because he had exhausted the tax depreciation benefits and was liquidating a partnership;

C) He had owned the property for years;

D) The property was in good condition;

E) The tenant had just moved out of the property and he would have another tenant in place by the time of settlement; and

F) The property was easy to rent and he had it rented continually for $375 per month, plus utilities.

155. Between the time of the initial telephone conversation and on or about February 23, 1989, Patsy Hoag

and Diaz had several conversations, both on the telephone and in person. During those conversations Diaz told Patsy Hoag:

A) The address of the property was 1615 Olive Street in the City of Baltimore;

B) The property was in good condition and met all housing codes;

C) The property had been appraised;

D) He had owned the property for years and was selling now because the tax depreciation benefits were exhausted; and

E) The property was easy to rent and he had rented it continuously for $375 per month, plus utilities.

156. On or about February 23, 1989, Patsy Hoag agreed to purchase 1615 Olive Street from Diaz, trading as Frederick Investment Partnership, for $18,500. Daniel [p. 39] Hoag signed the agreement, assenting to act as guarantor of the mortgage.

157. On or about early May, 1989, Patsy Hoag contacted Balt. S&L and asked if she could choose the lawyer for the closing. Balt. S&L said they would choose the attorney to perform settlement.

158. Settlement on the property occurred on or about May 16, 1989. The February 23, 1989 agreement with Diaz specified that the loan would be for fifteen years. The loan tendered by Balt. S&L had a five year balloon. When Patsy Hoag asked Diaz about this, he said not to worry, Balt. S&L would roll over the loan at the end of five years. At the closing Resnick gave papers to

the Hoags so fast they did not have an opportunity to read them. The Hoags believed Resnick was acting as their attorney at the closing and was acting for their benefit at the settlement.

159. After the closing Patsy Hoag discovered that 1615 Olive Street was not in good condition as represented by Diaz. She found that the heating ducts were not connected to the registers, there were structural defects in the joints and beams under the kitchen which caused the kitchen floor to sag, the furnace and stove had to be replaced and the bathroom windows did not fit and had to be replaced. The Hoags spent in excess of $3000 repairing and renovating the property, plus spending a substantial amount of time, just to repair some of the problems that Diaz claimed the property did not have.

160. Diaz lied when he said he had the property was rented continually at $375 per month. The property usually was vacant and the market rate in that area for properties in the condition of 1615 Olive Street was about $200 per month. Diaz did not have a tenant in the property at the time of settlement.

161. The Hoags mailed monthly mortgage checks to Balt. S&L from 1989 to

* * *

APPENDIX B

Relevant Pages Of The District Court Decisions

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ANTHONY MUNAFO, et al.,	:	
Plaintiffs	:	
	:	CIVIL ACTION
v.	:	NO. R-91-1359
GERALD DIAZ, et al.,	:	
Defendants,	:	

MEMORANDUM AND ORDER

Pending before the Court in the above-captioned case are several motions filed by plaintiffs Anthony and Michael Munafo and defendants Gerald Diaz, Shannon Turner, and HRL, Inc. (the "Diaz defendants") and Alleck Resnick, Resnick, Sopher & Perlow, P.A., and Bay State Title Company (the "Resnick defendants"). The Munafos have moved for leave to amend complaint, and none of the defendants oppose this motion. The Diaz defendants and the Resnick defendants have each filed a motion to dismiss. In addition to their opposition to a dismissal, plaintiffs have filed a motion to strike the reply brief of the Diaz defendants.[1] Finally, all the defendants have

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[1] Because the motion to strike is not relevant to the central dispute between these parties and only concerns the technicalities of the filing of the Diaz defendants' reply, the Court shall deny the motion to strike and focus on the merits of defendants' motions to dismiss.

filed motions to stay discovery.[2] The issues have been briefed by counsel for both

* * *

[p. 7] actually purchased. Likewise, defendants have completely failed to allege or establish that plaintiffs knew or should have known of all the elements of all seven causes of actions before May 15, 1988 merely because they learned of the defective condition of 216 South Bruce Street sometime after May 5, 1988.

B. The RICO Claims

In 18 U.S.C. § 1964(c), RICO provides for a private federal cause of action based on injuries suffered as a result of conduct prohibited by 18 U.S.C. § 1962. Section 1962 prohibits (a) the use of income derived from a "pattern of racketeering activity" to acquire an interest in, to establish, or to operate an "enterprise;" (b) the acquisition or maintenance, of any interest in or control of an "enterprise" through a "pattern of racketeering activity;" (c) any "person" employed or associated with an "enterprise" from conducting the enterprise's affairs through a "pattern of racketeering activity;" and (d) conspiracy to commit (a), (b), or (c). Plaintiffs have sued defendants under each of these provisions, and both the Resnick

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[2] Defendant Gerald Diaz and the Resnick defendants have also filed motions to dismiss in two related cases, *Maas v. Diaz*, Civil Action No. R-91-1360, and *Cherrey v. Diaz*, Civil No. R-91-1361. They have requested a stay of discovery in each case pending disposition of the motions to dismiss. In light of the Court's disposition of the present motion, defendant's request is

* * *

defendants and the Diaz defendants have moved to dismiss on the grounds that the allegations in the complaint are insufficient to support the RICO claims.

In order to survive a motion to dismiss, a complaint setting forth a violation of § 1962(c) must allege "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S. P. R. L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). In [p. 8] Count XI of their complaint, plaintiffs allege that the defendants, "while employed by or associated with enterprises engaged in and which affect interstate commerce, conducted and participated in the conduct of those enterprises affairs through patterns of racketeering activity." The complaint goes on to allege and define several distinct "enterprises," including (1) an association in fact of any two or more of the defendants, (2) defendant Bay State Title Company, (3) defendant Resnick, Sopher & Perlow, P.A., and (4) Baltimore Savings and Loan Association. Each enterprise is alleged to be involved in racketeering as well as in lawful activities independent of the racketeering, such as the sale of real estate and the practice of law. Finally, Count XI alleges that the defendants engaged in mail and wire fraud on numerous occasions over the course of at least four years.[4] In Counts XII, XIII, and XIV, the plaintiffs restate the elements alleged in support of the § 1962(c) claim in terms of "acquisition and operation" of the enterprises to state a claim under § 1962(a), "acquisition and maintenance" of an interest in the enterprises to state a claim

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[4] These allegations are not merely conclusory, but incorporate the rather detailed allegations of fraudulent conduct which form the basis for the state law claims.

under § 1962(b), and conspiracy for purposes of § 1962(d).

In spite of the fact that these allegations facially satisfy the RICO pleading requirements, defendants argue that the complaint must be dismissed because plaintiffs have failed to properly allege the existence of a RICO "enterprise." As defined [p. 9] by statute, an "enterprise" is "any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact, although not a legal entity." 18 U.S.C. § 1961(4). The Supreme Court has interpreted "enterprise" to mean "a group of persons associated together for a common purpose of engaging in a course of conduct," with the members "function[ing] as a continuing unit." *United States v. Turkette*, 452 U.S. 576, 583 (1981). Further, a RICO "enterprise must be "separate and apart from the pattern of activity in which it engages." *Id.* at 583. In other words, a RICO enterprise must have a distinct existence beyond what is necessary to commit the alleged racketeering activities themselves. *United States v. Tillett*, 763 F.2d 628, 631 (4th Cir. 1985).

After exploring the required attributes of a RICO enterprise at length, defendants argue that because plaintiffs have not demonstrated the existence of an appropriate enterprise by alleging each fact necessary to prove this part of their case, the complaint must be dismissed. This argument is misplaced in the context of a motion under Rule 12(b)(6).

Under F.R.C.P. 8,[5] all that is required is "a short and plain statement of the claim showing that the pleader is entitled to relief." "Under the liberal theory of notice pleading in the federal rules, a complaint need not state 'facts,' 'ultimate [p. 10] facts,' or 'facts sufficient to constitute a cause of action.' " *Wade v. Johnson Controls, Inc.*, 693 F.2d 19, 21 (2d Cir. 1982), quoting 2A J. Moore & J. Lucas, Moore's Federal Practice 8.13 at 8-101 (2d ed. 1983). Indeed, it is not even necessary that a complaint explicitly address each element of a claim – it is sufficient that an inference may be drawn that the elements exist, and that there are alleged sufficient facts to enable the defendant to frame a response. *See Walker v. South Cent. Bell Tel. Co.*, 904 F.2d 275, 277 (5th Cir. 1990); *United States v. Bonanno Organized Crime Family of La Cosa Nostra*, 683 F. Supp. 1411, 1439 (E.D.N.Y. 1988), *aff'd*, 879 F.2d 20 (2d Cir. 1989). After drawing all inferences in the light most favorable to the plaintiffs, it simply does not appear to a certainty that the Munafos will be unable to prove any set of facts that would establish a RICO enterprise.[6] Of

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[5] The special pleading requirements of Fed. R. Civ. P. 9(b) apply to predicate acts of wire or mail fraud in RICO cases, but the general requirements of Rule 8 apply to the remaining RICO elements.

[6] Plaintiffs have alleged several possible enterprise structures, and it is clear that not every alleged enterprise will support liability on the part of every defendant. The question on this motion, though, is merely whether any of the alleged enterprises could possibly support liability on the part of the defendants. Because at least one of these structures is composed entirely of individuals, the Court need not address the continuing vitality of the dictum in *Benard v. Hoff*, 727 F. Supp. 211, 215 (D. Md. 1989), to the effect that corporations cannot associate in

course, were this case before the Court on a motion for summary judgment, the plaintiffs would have to show affirmatively that a *particular* enterprise existed, and that it bore an appropriate relation to the defendants to support liability.

[p. 11] C. The State Law Claims

Plaintiffs also claim that defendants' conduct gives rise to liability under theories of fraud, fraud by nondisclosure, constructive fraud, negligent misrepresentation, and conspiracy to defraud. The Resnick defendants attack these claims on the grounds that the allegations do not plead fraud with the specificity required by Fed. R. Civ. P. 9(b). That rule provides:

> In all averments of fraud and mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

In *Windsor Associates v. Greenfeld*, 564 F. Supp. 273 (D. Md. 1983), Judge Miller held that the term " '[c]ircumstances' refers to such matters as 'the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what [was] obtained thereby.' " *Id.* at 280, quoting C. Wright and A. Miller, *Federal Practice and Procedure*, § 1297 at 400-403. Under *Windsor*, the requirements of Rule 9(b) are satisfied if the complaint contains enough "particulars to

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fact to form an enterprise. For the same reason, the fact that the defendants cannot be both the "person" (i.e. defendant) and the "enterprise" for purposes of § 1962(c) is not dispositive here.

apprise defendants of the scheme they allegedly devised to defraud plaintiffs, the acts allegedly undertaken pursuant to that scheme, and what was obtained thereby." *Id.* It is simply not necessary, as defendants apparently contend, that a complaint allege specific facts sufficient to prove each element of these cause of action.

[p. 12] In their complaint, plaintiffs allege ample facts to set forth a scheme on the part of the defendants to defraud them during the course of a particular transaction. The complaint lists several allegedly false statements and intentional omissions made by Resnick on the defendants' behalf at the closing, and alleges that these false statements and omissions induced the plaintiffs to enter into an unfavorable transaction, causing them damages. Further, plaintiffs allege scienter on the part of the defendants.

These allegations satisfy the requirements of Rule 9(b), and are sufficient to survive a general attack under Rule 12(b)(6). As noted above, the present posture of the case limits the Court's review to the bare legal sufficiency of the allegations, and the Court expresses no opinion as to whether the alleged statements and omissions would support a tort action when viewed under the standards applicable to a motion for summary judgment.

Accordingly, it is this 17th day of March, 1992, by the United States District Court for the District of Maryland,

ORDERED:

1. That the motion to dismiss of defendants Gerald Diaz, Shannon Turner, and HRL, Inc. BE, and hereby IS, DENIED; and

2. That the motion to dismiss of defendants Alleck Resnick, Resnick, Sopher, & Perlow, P.A., and Bay State Title Company BE, and hereby IS, DENIED; and

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PATSY HOAG, et al.,	:	
Plaintiffs	:	CIVIL ACTION NO. R-91-2642
v.	:	
GERALD DIAZ, et al.,	:	
Defendants	:	

MEMORANDUM AND ORDER

Pending before the Court in the above-captioned case is defendant Baltimore Savings and Loan's motion to dismiss and request for sanctions.[1] The issues have been briefed by counsel for both sides, and the Court will rule without a hearing pursuant to Local Rule 105.6 (D. Md. 1989). For the reasons set forth below, defendant's motion will be denied.

Background

Plaintiffs, Patsy and Daniel Hoag, are in the business of investing in real estate. Defendant Gerald Diaz is a licensed real estate broker. Defendant Alleck Resnick, Esq., is a principal in defendant Resnick, Sopher & Perlow, P.A., and is also the treasurer of defendant Baltimore

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[1] Baltimore Savings has also filed motions to dismiss in two related cases, *Maas v. Diaz*, Civil Action No. R-91-1360, and *Cherry v. Diaz*, Civil No. R-91-1361. It has requested a stay of discovery in each case pending disposition of the motions to dismiss. In light of the Court's disposition of the present motion, defendant's request is moot as it concerns this action.

Savings & Loan. This action arises out of a transaction in which the plaintiffs claim that they were fraudulently induced by the defendants to purchase real property in Baltimore, Maryland, from defendant Diaz.

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[p. 4] racketeering as well as in lawful activities independent of the racketeering, such as the sale of real estate and the practice of law. Finally, Count XI alleges that the defendants engaged in mail and wire fraud on numerous occasions over the course of at least four years.[2] In Counts XII, XIII, and XIV, the plaintiffs restate the elements alleged in support of the § 1962(c) claim in terms of "acquisition and operation" of the enterprises to state a claim under § 1962(a), "acquisition and maintenance" of an interest in the enterprises to state a claim under § 1962(b), and conspiracy for purposes of § 1962(d).

In spite of the fact that these allegations facially satisfy the RICO pleading requirements, Baltimore Savings argues that the complaint must be dismissed because plaintiffs have failed to properly allege the existence of a RICO "enterprise." As defined by statute, an "enterprise" is "any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact, although not a legal entity." 18 U.S.C. § 1961(4). The Supreme Court has interpreted "enterprise" to mean "a group of persons associated together for a common purpose of engaging in a course of

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[2] These allegations are not merely conclusory, but incorporate the rather detailed allegations of fraudulent conduct which form the basis for the state law claims.

conduct," with the members "function[ing] as a continuing unit." *United States v. Turkette*, 452 U.S. 576, 583 (1981). Further, a RICO "enterprise" must be "separate and apart from the pattern of activity in which it engages." *Id.* at 583. In other words, a RICO enterprise must

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[p. 7] In *United States v. Angiulo*, 897 F.2d 1169, 1179 (1st Cir. 1990), *cert. denied sub nom. Granito v. United States*, 111 S.Ct. 130, 59 (1990), the Court rejected a challenge to RICO similar to that made by Baltimore Savings. Key to its decision, and to the decision of this Court, is the rule that "in the absence of first amendment considerations, vagueness challenges must be examined in light of a case's particular facts." *Id.* The *Angiulo* Court found that, under the facts of the case developed at trial, persons of ordinary intelligence would have had adequate notice that the conduct of the defendants at issue *in that case* constituted a "pattern of racketeering activity" under RICO. *Id.*

In this case, the defendants are alleged to have engaged in a pattern of conduct by which they fraudulently induced numerous victims to purchase real estate at unfair prices. Plaintiffs specifically allege that the defendants (1) repeatedly used the same techniques for luring victims, (2) made essentially the same misrepresentations, and (3) played the same roles in each fraudulent scheme. Accepting these allegations as true, the Court finds that a person of ordinary intelligence would have been on notice that these acts constituted a "pattern

of racketeering activity" under the "continuity plus relationship" approach announced by the majority in *Northwestern Bell.* 492 U.S. at 239. *See Uniroyal Goodrich Tire Co. v. Mutual Trading Corp.*, 749 F.Supp. 869, 874 (N.D. Ill. 1990).[5]

* * *

[p. 9] that scheme, and what was obtained thereby." *Id.* It is simply not necessary, as defendants apparently contend, that a complaint allege specific facts sufficient to prove each element of these cause of action.

In their complaint, plaintiffs allege ample facts to set forth a scheme on the part of the defendants to defraud them during the course of a particular transaction. The complaint lists several allegedly false statements and intentional omissions made by Resnick on behalf of Baltimore Savings at the closing, and alleges that these false statements and omissions induced the plaintiffs to enter into an unfavorable transaction, causing them damages. Further, plaintiffs allege scienter on the part of Baltimore Savings.

These allegations satisfy the requirements of Rule 9(b), and are sufficient to survive a general attack under Rule 12(b)(6). As noted above, the present posture of the case limits the Court's review to the bare legal sufficiency of the allegations, and the Court expresses no opinion as to whether the alleged statements and omissions would

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[5] Baltimore Savings cites *Firestone v. Galbreath*, 747 F.Supp. 1556 (S.D. Ohio 1990), in which the Court held the "pattern" requirement unconstitutionally vague and granted a

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support a tort action when viewed under the standards applicable to a motion for summary judgment.

Accordingly, it is this 14th day of February, 1992, by the United States District Court for the District of Maryland,

ORDERED:

1. That defendant's motion to dismiss BE, and hereby IS, DENIED; and

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